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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

No. 88-_____

ASHLEY TRANSFER & STORAGE CO., INC.;
DALE J. COOK MOVING AND STORAGE, INC.;
THOMAS W. BIVENS, SR.; AND JOHN D. COOK,

Petitioners

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The attorneys for the Petitioners above-named petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit that vacated a dismissal by the trial judge of one of the counts in a two count indictment and remanded it for a new trial.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit vacating the dismissal of one count of a two count indictment and remanding it for a new trial was decided on October 3, 1988, and is reported as United States of America v. Ashley Transfer & Storage Co., Inc., 858 F.2d. 221, (4th Cir. 1988) and is reprinted in the Appendix to this Petition at A-1. The Order denying the Petition for Rehearing with Suggestion for Rehearing In Banc was filed on November 16, 1988, and is reprinted in the Appendix to this Petition at A-27.

JURISDICTION

Jurisdiction of this Court is found in Title 28 United States Code, Section 1254(1) 1976 and in Supreme Court Rule 17.1(c) in that a federal court of appeals has decided a federal question in a way in conflict with

applicable decision of this Court and in Supreme Court Rule 17.1(a) in that a federal court of appeals has rendered a decision in conflict with the decisions of other federal courts of appeals on the same matter.

CONSTITUTIONAL PROVISION INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part that no person shall "be subject for the same offense to be put twice in jeopardy of life or limb".

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act, 15 United States Code, Section 1, provides in pertinent part:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is

> declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, ...

2. Title 18 United States Code, Section 371, provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The Petitioners are two moving and storage companies, Ashley Transfer & Storage Co., Inc and Dale J. Cook Moving and Storage, Inc. and two individuals, John D. Cook

(President of Dale J. Cook Moving and Storage) and Thomas W. Bivens, Sr. (President of Bivens Moving and Storage). Thomas Bivens' company had operated a moving and storage company but at the time of trial, the corporation no longer existed. Raymond Harshaw, who was Vice-President of Ashley Transfer & Storage and a defendant at the trial, died shortly after the decision below was filed. The Petitioners operated moving and storage companies in Charleston, South Carolina, and at various times contracted with the United States military to provide moving and storage services to military personnel being transferred overseas.

Count I of the indictment alleged that the Petitioners had conspired to fix prices charged to the United States for storage services at three military bases in South Carolina in violation of Section One of the

Sherman Act. Count II alleged that the Petitioners had conspired to defraud the United States in violation of Title 18, United States Code, Section 371.

Both counts relied on the same factual allegations concerning: (1) the time frame of the conspiracy; (2) the coconspirators; (3) the acts alleged; and (4) the methods by which the alleged conspiracies were carried out. The Government used substantially the same evidence at trial to prove both counts.

The district court refused to submit Count II to the jury because the trial judge decided that he would not sentence the Petitioners under both counts even if the jury found them guilty of both. The district court never expressly ruled on the multiplicity argument raised in the Petitioners' motion to elect, but it implicitly approved the motion because it

said that the Petitioners "committed only one crime" and "should be tried for that one crime". The court also remarked that "the conspiracy to violate the antitrust law is totally subsumed by the conspiracy to defraud", and that the Petitioners should not be "double dipped".

Count I which charged the Petitioners with violating the Sherman Act was submitted to the jury and all were found not guilty. Count II was formally dismissed in a form order after the jury returned the verdict of not guilty on Count I.

The government appealed the district court's refusal to submit Count II to the jury to the Fourth Circuit Court of Appeals and asked for a new trial of the Petitioners on Count II. The Petitioners took the position in the appeal, inter alia, that a retrial on Count II was barred by that

portion of the double jeopardy clause of the Constitution known as the doctrine of collateral estoppel. Simply put, the Petitioners submitted to the court below that when the jury found the Petitioners not guilty of Count I, the jury decided that no conspiracy existed among them and a new trial would be barred because the government would be collaterally estopped from retrying the same conspiracy in a subsequent trial.

Following the command of Ashe v. Swenson, 397 U.S. 436 (1970), the court below examined the entire record of the district court proceedings and determined that the jury must have acquitted the Petitioners on a finding that no conspiracy existed among them, notwithstanding the government's position that the jury could have based its verdict on a finding that the government failed to prove that the Petitioners'

activities impacted on interstate or foreign commerce. The court stated that ordinarily the government would be collaterally estopped from retrying the conspiracy charge in a subsequent trial because the jury found there was no conspiracy. However, the court below ruled that the government could try the same conspiracy again because the court concluded that the Petitioners induced the district court judge not to submit Count II to the jury and eventually to dismiss it. Under these circumstances, the court held, the Petitioners may not assert collateral estoppel as a bar against a second trial. In other words, even though the jury acquitted the Petitioners and found that no conspiracy existed, the court below ruled that the government could try them again for the same conspiracy.

REASONS FOR GRANTING THE WRIT

I. PURSUANT TO SUPREME COURT RULE 17.1(C), THIS COURT SHOULD REVERSE THE COURT BELOW BECAUSE IT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT, NAMELY ASHE V. SWENSON, 397 U.S. 436 (1970).

In Ashe v. Swenson, 397 U.S. 436 (1970) this Court held that collateral estoppel applies to criminal prosecutions as an element of the double jeopardy clause and, therefore, the government is precluded from relitigating an issue decided in a defendant's favor after a valid final judgment. In this case the court below correctly held that the issue of whether the Petitioners were involved in a conspiracy was decided against the government when the jury found them not guilty of Count I of the indictment but directly violated the holding

in Ashe when it nonetheless held that the government could relitigate this issue in a second criminal trial against the same Petitioners. The court below inexplicably ruled that collateral estoppel is not available to these Petitioners because they chose prematurely to end the prosecution against them on Count II. Ashe simply does not allow a court to do what the court below has done by this ruling.

The court below, citing United States v. Scott, 437 U.S. 82 (1978), based its ruling on the fact that successive prosecutions which will result from its ruling were caused by the Petitioners' choice to end the prosecution of Count II without it being submitted to the jury for a determination as to their guilt or innocence. Scott has no relevance to this case. In Scott the trial judge granted a pre-trial motion to dismiss

for pre-indictment delay at the close of all of the evidence without any submission to the judge or jury of the defendant's guilt or innocence. This Court held that because no final determination of guilt or innocence by either judge or jury was made as a result of the defendant's successful motion, double jeopardy was not offended by subjecting Scott to another trial. The policy interest promoted by the Court was the "public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case". Scott, supra at 101. This case differs from Scott because the Petitioners have been tried on the alleged conspiracy, the same alleged conspiracy involved in both counts, and have been found not guilty. No evidence was excluded from the jury's consideration because the trial judge did not dismiss Count II until the end

of all of the evidence in the trial, nor was any jury instruction given to disregard any evidence as to Count II in their deliberations of the conspiracy charged in Count I. Thus, the jury verdict of not guilty of the conspiracy charged in Count I was in every sense a verdict of not guilty of Count II. Because the purpose of a new trial in this case would not be for the purpose set out in Scott, supra at 101, that case does not control here. On the contrary, the principles of collateral estoppel as set out in Ashe v. Swenson, supra, control this case and the court below should be reversed.

II. PURSUANT TO SUPREME COURT RULE 17.1(A), THIS COURT SHOULD GRANT THE WRIT BECAUSE THE COURT BELOW HAS RENDERED A DECISION THAT IS IN CONFLICT WITH OTHER FEDERAL COURTS OF APPEAL AND IN CONFLICT WITH THE DISTRICT OF COLUMBIA COURT OF APPEALS.

The Court below has decided that the doctrine of collateral estoppel as defined in Ashe v. Swenson, 397 U.S. 436 (1970), does not apply to multi-count indictments. The government urged the adoption of this so-called multi-count exception to Ashe, supra, in United States v. Mespoulede, 597 F.2d 329 (2nd Cir. 1979); United States v. Bowman, 609 F.2d 12 (D.C. Cir. 1979); and in United States v. Felder, 548 A.2d 57 (D.C. App. 1988) and in each case, it was rejected. In each of these cases, multi-count indictments were submitted to the jury, and in each case the jury reached verdicts of not guilty on some of the counts and failed to reach verdicts on the other counts. The counts for which there were verdicts and those for which there were not had issues in common, and the government urged on appeal that the common issues could be re-tried because collateral

estoppel did not apply when there were multi-count indictments. Each court decided that there is no multi-count exception to Ashe, supra, and held that the government could not re-try issues in a second trial that were adversely decided against it in the first trial. The reasoning of the courts is stated in United States v. Mespoulede, supra:

> Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

597 F.2d at 337.

The court below stands alone among the federal courts of appeals which have decided this issue in holding that Petitioners can be re-tried for the same conspiracy for which they have been found not guilty by a jury merely because there was a multi-count indictment. The Petitioners respectfully submit that the Second Circuit Court of Appeals, the District of Columbia Circuit Court of Appeals and the District of Columbia Court of Appeals have correctly ruled on the doctrine of collateral estoppel in multi-count indictment situations when juries reach verdicts in some but not all counts that have factual issues in common.

CONCLUSION

For the reasons stated herein, the Petitioners urge this Court to grant the writ of certiorari.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-5153

UNITED STATES OF AMERICA,

Plaintiff - Appellant

v.

ASHLEY TRANSFER & STORAGE CO., INC.;
DALE J. COOK MOVING AND STORAGE, INC.;
THOMAS W. BIVENS, SR.; JOHN D. COOK

Defendants - Appellees

Appeal from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, District Judge. (CR-87-148)

Argued: June 10, 1988
Decided: October 8, 1988

Before HALL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Robert J. Wiggers (Charles F. Rule, Assistant Attorney General; Kenneth G. Starling, Deputy Assistant Attorney General; John J. Powers,

III; Constance K. Robinson, Nancy H. McMillen, Michael D. Billiel, Philip J. Thompson, DEPARTMENT OF JUSTICE; Vinton D. Lide, United States Attorney on brief) for Appellant. Lionel Stukes Lofton (Michael P. O'Connell, Parks N. Small on brief) for Appellees.

BUTZNER, Senior Circuit Judge:

The government appeals from the district court's refusal to submit to the jury the second count of an indictment charging the defendants in count I with conspiring to fix prices in violation of the Sherman Act and in count II with conspiring to defraud the government in violation of 18 U.S.C. Section 371. The government asserts that the district court lacked discretion to refuse to submit count II and it seeks a new trial on this count. The defendants oppose the appeal, arguing that it violates the double jeopardy clause of the Constitution, as well as principles of collateral estoppel. Because count II should have been submitted

to the jury, we vacate the judgment dismissing this count. We also hold that this appeal is not barred by either double jeopardy or collateral estoppel, and we remand the case for a new trial on count II.

I

The defendants are two moving and storage companies, Ashley Transfer & Storage Co. and Dale J. Cook Moving and Storage, Inc., and three individuals, Raymond C. Harshaw (vice president of Ashley Transfer), John D. Cook (president of Dale J. Cook Moving), and Thomas W. Bivens, Sr. (president of Bivens Moving and Storage). Thomas Bivens' company had operated a moving and storage company but by the time of trial, the corporation no longer existed. The defendants operated moving and storage companies in Charleston, South Carolina. They had at various times contracted with the

United States military to provide moving and storage services for military personnel being transferred overseas.

Count I of the indictment alleged that the defendants had conspired to fix prices charged the United States for storage services at three military bases in South Carolina in violation of Section 1 of the Sherman Act.[1] Count II alleged that the defendants had conspired to defraud the United States in violation of 18 U.S.C. Section 371.[2]

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[1] Section 1 of the Sherman Act, 15 U.S.C. Section 1, provides in pertinent part:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.

[2] Title 18 U.S.C. Section 371, entitled Conspiracy to Commit Offense or to Defraud the United States, provides:

Both counts relied on the same factual allegations concerning: (1) the time frame of the conspiracy; (2) the coconspirators; (3) the acts alleged; and (4) the methods by which the conspiracies were carried out. The government used substantially the same evidence at the trial to prove both counts.

Before trial Bivens filed a motion, in which the other defendants later joined, requesting the court to require the government to elect between prosecuting count I or count II. The defendants argued that counts I and II were multiplicitous and that the government should not be allowed to

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> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

prosecute both counts. The district court deferred ruling on the motion and the case proceeded to trial on both counts. At the end of the trial, the district court denied the defendants' motions for judgment of acquittal. The district court did not expressly rule on the defendants' motion to require the government to elect. Instead, after referring to the motion, it in effect made the election by declining to submit count II to the jury. The jury returned a verdict of not guilty as to all defendants on count I. The district court then entered judgments acquitting the defendants on count I and dismissing count II.

II

The district court refused to submit count II to the jury because it decided that it would not sentence the defendants under both counts even if the jury found them

guilty on both. The district court never expressly ruled on the multiplicity argument raised in the defendants' motion to elect, but it implicitly approved the motion because it said that the defendants "committed only one crime" and "should be tried for that one crime." The court also remarked that "the conspiracy to violate the antitrust law is totally subsumed by the conspiracy to defraud," and that the defendants should not be "double dipped."

There is no merit to the defendants' argument that counts I and II are multiplicitous. In Blockburger v. United States, 284 U.S. 299, 304 (1932), the Supreme Court established a test of multiplicity. Where each offense requires proof of a fact not required by the other, a defendant can be punished under both statutes for a single act or transaction. Accord Abernaz v. United States, 450 U.S. 333, 338-39 (1981) (Congress

can impose multiple punishment for a single act that violates more than one statute); United States v. Tedder, 801 F.2d 1437, 1446-47 (4th Cir. 1986) (no multiplicity even though same evidence used to prove each conspiracy because conduct in question violated different statutes defining separate offenses).

Under the Blockburger test, counts I and II charged separate offenses. The Sherman Act requires a showing of an effect on interstate or foreign commerce but not an effect on the government. Section 371 requires a showing of fraud on the government but not an effect on commerce. The two statutes serve separate and distinct purposes. The Sherman Act prohibits collusive activity in restraint of trade. Section 371 forbids the perpetration of fraud against the United States government.

In United States v. Walker, 653 F.2d 1343, 1351 (9th Cir. 1981), the court held that under the Blockburger test, 18 U.S.C. Section 371 and Section 1 of the Sherman Act are two separate offenses. We concur with the Ninth Circuit and hold that the defendants' multiplicity argument is meritless.

The defendants contend that the district court did not dismiss count II but rather made a factual determination that there was insufficient evidence to support sending both counts to the jury. The defendants argue further that the trial judge's action constituted an acquittal on count II that is unappealable.

There is no support for this contention. The district judge explicitly called his ruling on count II a dismissal. Moreover, the trial judge stated that there was sufficient evidence of a conspiracy to fix

prices. Although the court entered a judgment of acquittal on count I, it did not acquit the defendants on count II.

The district court had no discretion to refuse to submit count II. Rules 8(a) and 14 of the Federal Rules of Criminal Procedure provide for the joinder of multiple offenses arising from the same acts, unless joinder would be prejudicial to defendant. In United States v. Maryland State Licensed Beverage Ass'n, 240 F.2d 420, 422 (4th Cir. 1957) we held that the government could not be forced to elect between two conspiracy counts, each alleging a violation of a different section of the Sherman Act, arising from the same conspiracy because there was no possible prejudice to the accused from trying the two counts together. Similarly, in this case the defendants would not have been prejudiced by having counts I and II tried together.

In our system, courts are not free to "interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965); see also In re Grand Jury, 315 F. Supp. 662, 672-74 (D. Md. 1970). Even in those instances where Congress intended only one conviction and one sentence for the violation of two statutes, the court should instruct the jury on both counts. If the jury returns guilty verdicts for each count, the court should enter judgment on only one of the statutory offenses. Ball v. United States, 470 U.S. 856, 865 (1985). Based on this precedent, it is clear that when both counts can support separate convictions, both should be submitted to the jury. If, as here, the district judge believes only one sentence is appropriate, he can achieve that result by

combining the counts for sentencing or imposing concurrent sentences. The Sentencing Guidelines provide the procedure for imposing punishment for crimes committed after the Guidelines' effective date when a defendant is convicted on multiple counts.

The district court's refusal to submit count II to the jury and the subsequent dismissal of the count was an unauthorized intrusion upon the prerogative of the government to seek an adjudication of guilt on each count.

III

The government urges us to remand the case to the district court for a new trial of the defendants on count II. The defendants oppose this appeal generally, and remand specifically, on the grounds that retrial on count II is barred by the double jeopardy clause of the Constitution. The double

jeopardy clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The defendants argue that under the "same evidence test" employed in United States v. Ragins, 840 F.2d 1184 (4th Cir. 1988), double jeopardy bars retrial on count II because essentially the same evidence which was used against the defendants in the trial on count I would suffice to convict on count II.

In Ragins, the government filed a new conspiracy indictment against a defendant who had been acquitted of conspiracy at an earlier trial. The defendant claimed that he was being reprosecuted for the same conspiracy. In determining whether the successive prosecutions involved the same offense, we employed the "same evidence test" which focused not on the formal elements of the two offenses but rather on the proof used to establish them. We stated that "the

second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged." 840 F.2d at 1188.

The Ragins "same evidence test" is inapposite here because this case does not involve successive prosecutions. Rather, the government brought both charges in a single indictment against the defendants and sought to try both charges together. The defendants' exposure to a second trial on count II is due only to their success in forestalling a proper adjudication of count II in the first trial.

The Supreme Court's decision in United States v. Scott, 437 U.S. 82 (1978), is controlling here. In Scott, the defendant was indicted for distribution of narcotics. He moved to dismiss two counts on the ground that his defense had been prejudiced by

preindictment delay. At the close of the evidence, the court granted the defendant's motion and the government appealed. The defendant argued that the government's appeal was barred by the double jeopardy clause. 437 U.S. at 100.

The Supreme Court held that because the defendant deliberately sought termination of the proceedings against him "on a basis unrelated to factual guilt or innocence of the offense of which he is accused, [he] suffers no injury cognizable under the double jeopardy clause if the government is permitted to appeal from such a ruling of the trial court in favor of defendant." 437 at 98-99. The Court explained that the purpose of the double jeopardy clause is to guard against government oppression. When a defendant's choice and not government oppression causes successive prosecutions, "no interest protected by the double jeopardy

clause is invaded when the government is allowed to appeal and seek reversal of such a midtrial termination of the proceedings in a manner favorable to the defendant." 437 at 100; see also Jeffers v. United States, 432 U.S. 137, 150-54 (1977) (second trial permitted where defendant "was solely responsible for the successive prosecutions for conspiracy offense and the continuing enterprise offense").

Here the district court disposed of count II on a basis unrelated to the factual guilt or innocence of the defendants. Although the district court never expressly granted the defendant's motion to require election, it is clear from the record that the defendants' motion induced the court's refusal to submit count II to the jury as well as its ultimate dismissal of count II.

Following the reasoning of Scott, we hold that the double jeopardy clause does not bar the government's appeal.

IV

The defendants also argue that principles of collateral estoppel bar the government's appeal. Specifically the defendants contend that in finding them not guilty the jury determined that no conspiracy existed among them and that a new trial is precluded because the government is collaterally estopped from relitigating the conspiracy issue in a subsequent trial. The government responds that the jury could have based its verdict on other grounds and that they are therefore not collaterally estopped from relitigating the conspiracy issue.

In criminal cases, the government is collaterally estopped from retrying an issue of fact once it has been resolved in the

defendant's favor by a valid and final judgment in a criminal proceeding. If the fact necessarily determined in the first trial is an essential element of the second offense, collateral estoppel may operate as a complete bar against the subsequent prosecution. United States v. Ragins, 840 F.2d 1184, 1193-94 (4th Cir. 1988).

A defendant relying on collateral estoppel must show that the issue whose relitigation he seeks to foreclose was necessarily determined in the former trial. United States v. Head, 697 F.2d 1200, 1208 (4th Cir. 1982). Where acquittal is by general verdict, however, it is often difficult to determine what issues were necessarily determined in the defendant's favor. In Ashe v. Swenson, 397 U.S. 436, 444 (1970), the Supreme Court said:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the

> hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclosure from consideration.

The Court urged lower courts to apply collateral estoppel with "realism and rationality rather than hypertechnicality" [because] "any test more technically restrictive would amount to a rejection of the rule of collateral estoppel in criminal proceedings." 397 U.S. at 444.

The Court gave an example of an overly mechanical application of the collateral estoppel test:

> If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the

> defendant did not contest, the possible multiplicity of prosecutions is staggering. Such a restrictive definition of "determined" amounts simply to a rejection of collateral estoppel since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction.

397 at 444 n.9 (quoting Mayers & Yarbrough, Bis Vexori: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38-39 (1960)).

The issue contested by the parties here is whether the jury, in rendering its verdict of not guilty, necessarily determined whether a conspiracy existed among defendants. The government argues that since the Sherman Act requires a showing that defendant's activities impacted interstate or foreign commerce, the jury could have based its verdict on a finding that the government failed to prove that element. In so arguing, the government suggests that the jury may

have disbelieved substantial and uncontroverted evidence on a point the defendants did not contest.

The government presented substantial evidence at trial that the defendants' activities affected interstate or foreign commerce. Two government witnesses testified about the impact of the defendants' activities on interstate commerce. In addition, the defendants stipulated to the introduction of documentary evidence showing that the transactions between the government and the defendants implicated interstate commerce. Finally, the government argued the interstate commerce issue in its summation to the jury.

By contrast, the defendants did not introduce any evidence on the interstate commerce issue. Counsel for the defendants did not cross examine any of the government's witnesses on this issue nor did they address

the issue during opening statement or closing argument. The defendants' sole defense was that no conspiracy existed among the defendants and coconspirators to fix prices.

Finally, in a conference with counsel about jury instructions, the district judge said there was no question that the defendants' activities impacted interstate commerce.[3]

Even though the government does not contest the fact that the defendants conceded the interstate commerce issue throughout the trial, the government argues that the jury

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[3] One commentator has observed that the interstate commerce issue is essentially a nonissue in most Sherman Act cases:

> Once one focuses on the inherent effects of a trade restraint in a national economy together with the long-held rule that the magnitude of interstate effects is irrelevant, there are astonishingly few offenses to antitrust principles that do not 'affect commerce.' Areeda & Hovenkamp, Antritrust Law Section 231.1 (Supp. 1987).

was nevertheless "troubled by" the issue because it asked the judge to repeat the instruction on the issue. After some deliberation, the jury asked the judge to "go over the law of conspiracy and the law of trade and commerce." We cannot agree with the government that this broad request signified that the jury was "troubled" over the interstate commerce issue. The trial judge read the jury over 30 pages of instructions on numerous topics including the elements of a Section 1, Sherman Act violation. Given the prolixity and complexity of the jury instructions, it is not remarkable that the jury asked the judge to repeat parts of the instructions.

In summary, the government presented substantial evidence on the interstate commerce issue which the defendants did not even attempt to controvert. Consistent with the Supreme Court's admonition in Ashe, 397

U.S. at 444, we cannot say that the jury could have based its acquittal on its disbelief of the government's evidence.

Since the jury could not rationally have based its acquittal on the interstate commerce issue, it must have acquitted the defendants on a finding that no conspiracy existed among the defendants. Ordinarily the government would therefore be collaterally estopped from retrying the conspiracy issue in a subsequent trial.

If the government is collaterally estopped from relitigating the conspiracy issue in a subsequent trial, collateral estoppel operates as a complete bar against a new trial because proof of the conspiracy is an essential element of count II. See United States v. Ragins, 840 F.2d at 1193-94. Where collateral estoppel operates as a complete bar against a subsequent prosecution, collateral estoppel is coextensive with

double jeopardy. Phillips v. United States, 502 F.2d 227, 230 n.14 (4th Cir. 1974).

Where collateral estoppel becomes coextensive with double jeopardy, the same considerations which governed the Supreme Court's decision in United States v. Scott, 437 U.S. at 98-100, control. Specifically, where the government has made no effort to prosecute the charges seriatim, the "considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." Ohio v. Johnson, 467 U.S. 493, 500 n.9 (1983) (dictum).

Where, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy.

We vacate the district court's judgment dismissing count II and remand for a new trial.

VACATED AND REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-5153

United States of America

Plaintiff-Appellant

versus

Ashley Transfer & Storage Co., Inc., et al

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Hall and Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK

Supreme Court, U.S.
FILED
APR 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1305

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASHLEY TRANSFER & STORAGE CO., INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' acquittal on a charge of Sherman Act conspiracy collaterally estops the government from prosecuting petitioners on a charge of conspiracy to defraud the United States that was brought to trial together with the Sherman Act conspiracy count but was erroneously dismissed at petitioners' request.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1305

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 858 F.2d 221.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1988. A petition for rehearing was denied on November 16, 1988 (Pet. App. A27-A28). The petition for a writ of certiorari was filed on January 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 9, 1987, a federal grand jury sitting in the District of South Carolina indicted petitioners and a co-defendant (now deceased) on one count of conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (Count I), and one count of conspiracy to defraud the government, in violation of 18 U.S.C. 371 (Count II). Before trial, petitioners all joined in a "motion to elect," in which they argued that the counts were multiplicitous. The district court deferred ruling on the motion, but at the close of the evidence the court stated that it would not charge the jury on Count II. The jury, which was charged only on Count I, returned verdicts of not guilty as to all defendants. The district court then entered judgments of acquittal on Count I and dismissal on Count II. The court of appeals vacated the judgments of dismissal as to all defendants and remanded for a new trial on Count II.

1. Petitioners were engaged in the business of providing storage of household goods for military personnel and their families. They performed that service under contract with the government at three military bases near Charleston, South Carolina. Both counts of the indictment alleged that petitioners engaged in a conspiracy from February 1978 until the date of the indictment to fix the prices for military storage services. C.A. App. 16-30. Count I alleged that petitioners' storage services were in and affected interstate commerce (*id.* at 21), a necessary element of a Sherman Act violation. Count II incorporated by reference the terms of the conspiracy as set forth in Count I but also alleged the elements of fraud on the government, interference with the governmental functions of the Military Traffic Management Command, and overt acts committed in furtherance of the conspiracy. *Id.* at 22-30.

At trial, three witnesses testified about meetings attended by moving company representatives, including the individual petitioners, at which storage prices were fixed. David Barnette, the assistant manager of M&M Transfer, testified about one meeting at M&M's warehouse in the first half of 1978 at which the participants agreed to raise their rates from $8.60 to $12 per 100 pounds; one firm was to raise its rates first, and the others were to follow. I Tr. 46-57. Ralph Finnicum, the vice president of petitioner Dale J. Cook Moving and Storage, Inc. (Cook Inc.), who prepared Cook Inc.'s rate increase letter, confirmed the meeting at M&M's warehouse. II-A Tr. 239-245. The rates were raised accordingly: one firm increased its rates effective May 1, 1978, the two petitioner firms raised their rates effective July 1, and all of the other putatively competing firms rates their rates between July and November.

Barnette also testified about a meeting in the summer of 1979 at which the movers' representatives agreed to another rate increase; because of concern about an investigation in Columbia, South Carolina, they did not fix a new rate at that meeting but agreed that Ashley Transfer and Cook Inc. would file initial increases that the others would follow. I Tr. 58-62. Benny McMillan, a manager for Nilson Van & Storage, testified about a similar meeting in the summer of 1979, attended by petitioners Bivens and Cook and their deceased co-defendant, Raymond Harshaw, who was vice-president of Ashley Transfer. II Tr. 150-154. Ashley Transfer and Cook Inc. in fact raised their rates to $16.50 per 100 pounds effective September 1, 1979, by letters sent only four days apart, on July 9 and 13, 1979. I-A Tr. 174; II-A Tr. 225; III Tr. 230-231. About the same time, however, the government imposed a freeze on rate changes from August 15 to December 1, 1979, which "messed up" further implementation of the agreement. I Tr. 74-76, 116-117; GX B-4.

John Meeks, the president of M&M, testified that when the others failed to follow the initial rate increases in December, he talked with Harshaw, petitioner Bivens, and "probably" others, and that Bivens agreed to raise his company's rates first. II Tr. 175-177, 182-183. Bivens then filed a rate increase letter on December 17, 1979, and M&M, Nilson, and five other carriers followed with their own rate increases a month later. I-A Tr. 174-175; II-A Tr. 271-272; GX A-1. The following summer Barnette was asked, in his capacity as a member of the Rates and Tariffs Committee of the Charleston Movers Association, to check on whether every mover had raised its military storage rates. After obtaining the necessary information from the government, he reported back that "there was a discrepancy in the zone two rates." I Tr. 80-82. When Harshaw complained, noting that he had been hurt as an "initial filer" because everyone else was so slow to file, Barnette called the mover with the low rates to tell him "there were some people who were not happy" because his rates were not in line. I Tr. 82.

To show that petitioners' conduct was subject to the Sherman Act because it was in or affected interstate commerce, the government relied primarily on testimony that storage is an integral part of the overseas transfer of military personnel, and that restraints on storage could result in a freeze on such transfers. IV-A Tr. 373-375. Beyond that, the government introduced only brief testimony that most of the property is shipped directly out of state when it is taken out of storage (I Tr. 39), and records stipulated into evidence without live testimony showing that the defendants purchased substantial amounts of storage equipment from out of state (GXs H-1, I-1, J-1, K-1, L-1, M-1, N-1, admitted at III-A Tr. 319-323).

To show that the conspiracy was intended to and did defraud the government, the government introduced certificates of independent price determination submitted by Ashley Transfer, Cook Inc. (including one signed by petitioner Cook), and M&M Transfer (I Tr. 73-74; II-A Tr. 237-238, 256), together with evidence that the government had paid the storage companies in the Charleston area more than $4.3 million during the period of the conspiracy (III-A Tr. 326-327).

2. At the end of the government's case and again at the close of the evidence, the district court rejected petitioners' motions for judgments of acquittal. The court explicitly found that, "considering the evidence in the light most favorable to the Government, they have proven that there was a conspiracy and that all of these defendants were in it" (C.A. App. 60), and that the government had introduced "believable, credible evidence that * * * would support a conviction of * * * all of the Defendants to the charges contained in the indictment" (IV-A Tr. 381). The court noted, however, that "we've still got open the Motion of the Defendants to Require the Government to Elect." The court ruled that it would not submit both counts to the jury because, whether the law permitted it to do so or not, the court would not sentence the defendants on both. C.A. App. 61-62. The court held that it would charge the jury only on the Sherman Act count, stating: "I think they committed one crime, and they should be tried for that one crime, and if they are convicted, they should be punished for that one crime. And I don't think we ought to double dip them, and I am not going to do it." *Id.* at 67-68.

Accordingly, the court charged the jury only on the Sherman Act count, and it instructed the jury to ignore prior references to a second count. IV Tr. 273; C.A. App.

87-88. The following day, the jury requested supplemental instructions on both the conspiracy and the interstate commerce issues. C.A. App. 111-112, 115. In both sets of instructions, the court charged that the government must show a restraint on the flow of "goods or services"; the court inadvertently omitted any reference to the movement of people as an element of commerce, although it had agreed to charge on that issue. *Id.* at 71-73, 101-103, 126-130. The jury returned a verdict of not guilty (*id.* at 131), and the court issued judgments acquitting the defendants on the Sherman Act count and dismissing the count charging conspiracy to defraud the government (*id.* at 134-138).

3. The government appealed the judgment dismissing the second count. The court of appeals held that the Sherman Act and fraud charges were not multiplicitous, that petitioners had shown no prejudice arising from joinder of the two offenses for trial, and that, in the absence of any such showing of prejudice, "the district court's refusal to submit count II to the jury and the subsequent dismissal of count II was an unauthorized intrusion upon the prerogative of the government to seek an adjudication of guilt on each count." Pet. App. A7-A12.

The court of appeals also ruled that there was no bar under the Double Jeopardy Clause to a retrial of Count II. The court rejected two distinct contentions that petitioners had advanced in an effort to bar a retrial. First, the court held that the prior proceedings on Count II itself did not bar a retrial. The court observed that petitioners themselves had induced the trial court to dismiss Count II on a basis unrelated to their guilt or innocence by filing their motion for election. Thus, under *United States* v. *Scott*, 437 U.S. 82 (1978), and *Jeffers* v. *United States*, 432 U.S. 137, 150-154 (1977), retrial on Count II would not constitute double jeopardy on that count. Pet. App. A12-A17.

Second, the court held that the jury's verdict of acquittal on Count I did not bar a trial on Count II under the doctrine of collateral estoppel. The court agreed with petitioners that, despite the possibility that the acquittal on Count I could have been based on the jury's belief that the government had not adequately proved the interstate commerce element of Sherman Act conspiracy, the record showed that the jury must instead have concluded that no conspiracy existed. Pet. App. A20-A24. But the court held that the no-conspiracy finding could not be given collateral estoppel effect because, as this Court stated in *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984), "where the government has made no effort to prosecute the charges seriatim, the 'considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable.' " Pet. App. A25.

ARGUMENT

In this Court, petitioners contend only that the acquittal on Count I bars a trial of Count II under principles of collateral estoppel. The decision of the court of appeals rejecting that contention, however, fully comports with the decisions of this Court and does not conflict with any decision of another court of appeals. Moreover, the judgment of the court of appeals is correct for another reason on which that court did not rely, namely, that the jury did not necessarily determine that the government failed to prove the existence of a conspiracy. Review by this Court therefore is not warranted.

1. Petitioners advance separate contentions that the decision below conflicts with a decision of this Court (Pet. 10-13) and that it conflicts with decisions of three other courts (Pet. 13-16). Neither contention is accurate.

a. Far from conflicting with the decision below, this Court's decisions strongly support it. In *Ohio* v. *Johnson, supra*, the defendant, like petitioners here, had persuaded the trial court to dismiss certain charges. When the dismissal was found erroneous, the defendant argued that collateral estoppel (stemming from an alleged "implied acquittal" inherent in his conviction for lesser included offenses) barred the State from securing a retrial on the charges dismissed. This Court disagreed, observing that "in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." 467 U.S. at 500 n.9. That principle directly controls this case, and petitioners do not contend otherwise. Rather, despite the explicit reliance by the court of appeals on *Ohio* v. *Johnson* (Pet. App. A25), petitioners ignore that case and assert that the decision of the court of appeals is "inexplicabl[e]" (Pet. 11).

Petitioners assert that there is a direct conflict between the decision below and *Ashe* v. *Swenson*, 397 U.S. 436 (1970), but that is plainly not so. In *Ashe*, the State deliberately sought to try the defendant seriatim on seven informations (one for each victim and one for theft of the getaway car) arising from a single robbery of a group of six poker players. 397 U.S. at 457 (Brennan, J., concurring). In the Court's view, the State "treated the first trial"—which resulted in an acquittal—"as no more than a dry run for the second prosecution," *id.* at 447, which would enable the State to firm up its initial "weak[]" identification testimony. *Id.* at 438-440. It was the State, not the trial court or the defendant, that was responsible for dividing the case into separate trials, and it was in that context that the Court held that the Double Jeopardy Clause would not permit the State to relitigate a question

that had been resolved against it in the first of several trials that would all focus on the same issue.

Ashe v. *Swenson* would be controlling here only if in *Ashe* the State had sought to try all of the charges in a single proceeding but the trial court, at the defendant's request, had dismissed one or more of the charges. But those were not the facts of *Ashe*, and the Court's opinion does not suggest how the Court would have decided that case. The only case in which this Court has addressed such a fact pattern is *Ohio* v. *Johnson*, and that case supports the government's position, not petitioners'.

b. Petitioners also allege a conflict among the lower courts because, they assert, the court of appeals "has decided that the doctrine of collateral estoppel * * * does not apply to multi-count indictments." Pet. 14. Although such a holding might well be a proper construction of the Double Jeopardy Clause, particularly in light of *Ohio* v. *Johnson* and *United States* v. *Powell*, 469 U.S. 57, 68 (1984), no such broad holding was necessary in order to decide this case. Rather, the decision of the court of appeals rests on the much narrower holding that, "[w]here, as in this case, the defendant's choice [the successful 'motion to elect'] and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government." Pet. App. A25.

Collateral estoppel is an aspect of the Double Jeopardy Clause. See *Ashe* v. *Swenson, supra.* The distinction between successive prosecutions brought about by the defendant's voluntary actions and successive prosecutions that are beyond the defendant's control is therefore an important one. See *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) (plurality opinion) (Double Jeopardy Clause no bar to successive prosecutions for greater and lesser included offenses when defendant "elects to have the two offenses

tried separately and persuades the trial court to honor his election"); *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978) (government not barred by Double Jeopardy Clause from retrying defendant when defendant elects to seek midtrial dismissal on grounds unrelated to guilt or innocence); *United States* v. *Dinitz*, 424 U.S. 600, 606-607 (1976) (defendant may be retried after a mistrial, even if there was no "manifest necessity" for the mistrial, if the mistrial was declared at the defendant's request); see also *Ricketts* v. *Adamson*, 483 U.S. 1 (1987).

In light of that distinction, it is clear that the decision of the court of appeals does not conflict with *United States* v. *Bowman*, 609 F.2d 12, 17-18 (D.C. Cir. 1979); *United States* v. *Mespoulede*, 597 F.2d 329, 336-337 (2d Cir. 1979); or *United States* v. *Felder*, 548 A.2d 57, 66 (D.C. 1988). Each of those cases involved the retrial of one count of a multicount indictment that had been submitted to the jury in full but had resulted in an acquittal on one or more counts and a hung jury on other counts. Thus, in none of those cases was it the defendant's voluntary choice that gave rise to the need for a second trial. Here, by contrast, it was the defendants' "motion to elect," which the trial court erroneously granted, that necessitated a second prosecution. Nothing in *Bowman, Mespoulede,* or *Felder* would preclude the courts that decided those cases from reaching the same result that was reached in this case if the situation presented in this case came before them.*

---

* Indeed, the Second Circuit (which decided *Mespoulede*) and the District of Columbia Court of Appeals (which decided *Felder*) have recognized that the question whether collateral estoppel applies in a particular case involving a multicount indictment is far more complex than the simple issue that petitioners frame. Each court has declined to apply collateral estoppel in some such situations. See *United States* v. *Citron*, 853 F.2d 1055, 1058-1059 (2d Cir. 1988); *United States* v. *Smith*, 337 A.2d 499, 501-503 (D.C. 1975).

In *Bowman, Mespoulede,* and *Felder* the government had a full and fair opportunity to convince the juries of the defendants' guilt on the counts the courts later found precluded. In this case, as in *Jeffers* and *Scott,* the government was deprived of that opportunity on petitioners' own motion. And, had both counts been sent to the jury originally, the jury might have convicted petitioners of defrauding the government at the same time it acquitted them on the Sherman Act count, as the jury did in *United States* v. *Walker*, 653 F.2d 1343 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982). In short, petitioners, who elected to take one of the two counts away from the first jury, "ha[ve] not been 'deprived' of [their] valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' " *Scott,* 437 U.S. at 100 (quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)); see also *Standefer* v. *United States*, 447 U.S. 10, 22-23, 25 (1980).

2. In any event, the judgment of the court of appeals would be correct even if petitioners were right in contending that this case should be analyzed just as if the government had brought the Sherman Act charge separately from the fraud charge. Although the court of appeals concluded that the jury in this case must have found that petitioners did not engage in the conspiracy alleged (Pet. App. A20-A24), that conclusion is not sound. The court reached that conclusion by a process of elimination. It excluded the possibility that the jury found no effect on interstate commerce because the government introduced substantial evidence on that issue, and the defendants did not contest it. The court, however, overlooked the fact that the major part of the government's evidence and argument on this point related to the effect of the alleged conspiracy on the movement of military personnel (IV-A Tr. 373-375; IV Tr.

302-303). That entire line of proof was rendered ineffective by the district court's inadvertent failure to charge the jury that the movement of people is an element of commerce (C.A. App. 71-73, 101-102, 126-130). The remainder of the testimony, exhibits (stacks of checks and invoices stipulated into evidence), and argument on the issue were presented to the jury in such a cursory manner (I Tr. 39; IV Tr. 303-304) that their significance may well have been lost on lay jurors. Moreover, although petitioners did not contest the issue, the government had the burden of proof on it, and the jury obviously did not believe that petitioners had conceded the interstate commerce issue away because it asked the court for supplemental instructions on the point. C.A. App. 111-112, 115.

As the case stands, therefore, the question is whether the jury must have rejected the government's eyewitness testimony of conspiracy, challenged on grounds of credibility, rather than its proof of interstate commerce, undermined as it was by faulty jury instructions. We submit that, although the existence of an effect on interstate commerce may be obvious to the trained lawyer, the record here shows that it was not so clear to the jury. The lack of dispute on an issue may ordinarily be a reliable indicator that a jury could not rationally have based its decision on that issue, but in the peculiar circumstances of this case that may not be so. Thus, the decision to remand this case for a new trial on Count II is correct not only on the ground set forth by the court of appeals, but also because petitioners have not carried their burden of showing that the jury necessarily decided the conspiracy issue in their favor.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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